IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 826

FEDERAL TRADE COMMISSION,
Petitioner,

v.

RALADAM COMPANY,
Respondent.

BRIEF IN BEHALF OF RALADAM COMPANY, RESPONDENT, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Raladam Company, respondent herein, or its predecessors, have been engaged since 1909 or 1910 (R. 81) in selling to the retail and wholesale drug trade (R. 91) a pharmaceutical preparation called Marmola Prescription Tablets (R. 80). Marmola is manufactured for Raladam by Parke Davis & Company (R. 82-4), and is recommended for the treatment of obesity (R. 96-7).

The Federal Trade Commission, petitioner herein, first instituted proceedings against Raladam on February 29, 1928, alleging in its complaint that certain statements contained in the Marmola advertising, on the Marmola package, and in the circular enclosed therewith, to the effect that Marmola was a safe and scientific remedy for the treatment of obesity, were untrue and had "the tendency and capacity to mislead and deceive the purchasing public," with the result that such statements were "to the prejudice of the public and of competitors of respondent, Raladam Company, and constitute unfair methods of competition in commerce within the intent and meaning of *Sec. 5" of the Federal Trade Commission Act* (Raladam's Ex. 1).*

Raladam joined issue on these allegations, and the Commission, after a lengthy hearing, found them to be correct and ordered Raladam to cease and desist from making such statements concerning Marmola (Raladam's Ex. 1). Raladam appealed this order to the Circuit Court of Appeals for the Sixth Circuit (Raladam's Ex. 2), which entered a decree setting the same aside (Raladam's Ex. 3) on the ground that the Commission had no evidence before it that would support a finding (1) that Raladam's statements concerning the safety and scientific nature of Marmola as a treatment for obesity were false and misleading, or (2) that, even if false and misleading, they constituted "unfair methods of competition" within the purview of the statute.[1]

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* The record and proceedings in the case referred to were offered and received in evidence in the instant case as Raladam's Exhibits 1-10 (R. 74-5 and 494-8), and, although not incorporated in the printed record, are before this Court as physical exhibits pursuant to a stipulation between the parties hereto (R. 71).

1—*Raladam Company v. Federal Trade Commission*, 42 F. (2d) 430

The decree of the Circuit Court of Appeals for the Sixth Circuit was affirmed by this Court (Raladam's Ex. 10) in an appeal expressly limited to the question of the jurisdiction of the Commission (282 U. S. 829). In so doing, this Court held that the Commission lacked jurisdiction to proceed in a given case unless it had evidence before it that would support a finding of "unfair methods of competition" within the purview of the statute, which in turn required that "there be present or potential *substantial* competition, which is shown by proof, or appears by *necessary* inference, to have been injured or to be *clearly* threatened with injury, to a *substantial* extent, by the use of the unfair methods complained of." This Court then examined the record and found that the evidence before the Commission was insufficient to sustain such a finding, according to this test.[2]

The Commission thereupon petitioned, first, this Court, and then the Circuit Court of Appeals for the Sixth Circuit, under the procedure provided in Section 5 of the Federal Trade Commission Act,[3] for leave to adduce "additional evidence as to the competitors of petitioner herein, Raladam Company, and as to the injury to such com-

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2—*Federal Trade Commission v. Raladam Company*, 283 U. S. 643, 651, 652-54.

3—*Sec. 5 of the Federal Trade Commission Act* (Sec. 45, Title 15, U. S. C.) provides, in part, as follows:

"• • • If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. • • • "

petitors resulting from Raladam Company's unfair trade practices,'' but both of these petitions were denied (Raladam's Exs. 7 and 9).

Having failed to obtain permission to take such additional evidence of the alleged existence of competition and injury thereto, as aforesaid, the Commission commenced these new proceedings for that purpose, involving the same statute (Federal Trade Commission Act, as originally enacted), the same parties (Federal Trade Commission and Raladam Company), and the same subject matter (statements by Raladam that Marmola is a safe and scientific treatment for obesity). While perhaps worded and arranged a little differently, the Commission's amended complaint in the instant case (R. 44-54) contains substantially the same allegations as did its complaint in the previous case; and its finding (R. 15-39) and order to cease and desist based thereon (R. 40-44) in the instant case, though amplified in verbiage and somewhat changed in form, are, in substance, the same as its findings and order to cease and desist in the previous case.

In view of the foregoing, Raladam again petitioned the Circuit Court of Appeals for the Sixth Circuit to set aside the order of the Commission in the instant case (R. 1-15), on the following grounds:

(1) The previous case is *res adjudicata* of the issues now sought to be litigated by the Commission in the instant case.

(2) The Commission lacks the power to avoid the ruling of this Court and the Circuit Court of Appeals for the Sixth Circuit in the previous case, denying it

the right to adduce additional evidence as to competition and injury thereto, by instituting these new and independent proceedings for such purpose.

(3) The same considerations which compelled the setting aside of the Commission's order in the previous case should compel a like result in the instant case, not only under the principle of *stare decisis* but even though it were before the Court for the first time.

On October 7, 1941, the Circuit Court of Appeals for the Sixth Circuit, selecting as a basis for its action the third ground urged upon it by Raladam, as aforesaid, again set aside the order to cease and desist, issued by the Commission against Raladam, because "There was no substantial evidence supporting the formula of the Supreme Court that these advertisements substantially injured or tended to injure the business of any competitor * * *" (R. 784). It is to review this decision that the Commission has applied to this Court for a writ of certiorari.

ARGUMENT

A. Since the reviewing court must ultimately determine the question of what constitutes "unfair methods of competition in commerce," within the purview of the statute, in a given case, it is not limited, in reviewing findings of the Commission in this regard, as in reviewing mere findings of fact.

This Court has repeatedly held, in a long line of decisions, commencing with *Federal Trade Commission v. Gratz*, 253 U. S. 421, and including the previous case of *Federal Trade Commission v. Raladam Co.*, 283 U. S. 643, that the question of what constitutes "unfair methods of competition in commerce" within the purview of the statute in a given case is one for ultimate determination by the courts rather than by the Commission. In the *Gratz* case, *supra*, this Court said on page 427 of its opinion:

> "The words 'unfair methods of competition' are not defined by the statute and their exact meaning is in dispute. *It is for the courts, not the commission, ultimately to determine as matter of law what they include.* * * *" (Italics ours)

In *Federal Trade Commission v. Beech-Nut Packing Co.*, 257 U. S. 441, 453, in affirming the decision in the *Gratz* case, and elaborating on the reasons therefor, this Court held:

> "* * * Congress deemed it better to leave the subject ['unfair methods of competition'] without precise definition, *and to have each case determined upon its own facts*, owing to the multifarious means by which it is sought to effectuate such schemes. The Commission, *in the first instance, subject to the*

judicial review provided, has the determination of practices which come within the scope of the act. (See Report No. 597, Senate Committee on Interstate Commerce, June 13, 1914, 63rd Cong., 2nd sess.)" (Italics ours)

In the previous case of *Federal Trade Commission v. Raladam Co.*, 283 U. S. 643, 648, this Court, following its earlier decisions, again held that:

> "• • • Undoubtedly the substituted phrase ['unfair methods of competition'] has a broader meaning *but how much broader has not been determined.* It belongs to that class of phrases *which do not admit of precise definition*, but the *meaning* and *application* of which *must be arrived at* by what this court elsewhere has called 'the gradual process of *judicial* inclusion and exclusion.' *Davidson v. New Orleans*, 96 U. S. 97, 104. The question is one for the final determination of the courts and not of the Commission. *Federal Trade Comm. v. Gratz*, 253 U. S. 421, 427; *Federal Trade Comm. v. Beech-Nut Co., supra*, p. 453." (Italics ours)

In *Standard Oil Co. v. Federal Trade Commission* (C.C.A., 2nd Cir.), 273 F. 478, 481, which was affirmed by this Court in *Federal Trade Commission v. Sinclair Refining Co.*, 261 U. S. 463, 465, it was held:

> "• • • And this rule [that 'The question is one for final determination by the courts.'] is not avoided by [the Commission] stating as a finding of fact what is a mere conclusion of law. • • •"

Under the foregoing decisions, it is apparent that the question of what constitutes "unfair methods of competition," within the purview of the statute, in a given case, is one for ultimate determination by the courts rather than by the Commission. This is so, because "Congress deemed

it better to leave the subject without precise definition, and *to have each case determined on its own facts,*" with the result that "The Commission [merely], *in the first instance, subject to judicial review,* has the determination of practices which come within the scope of the act" (*Fed. Trade Comm. v. Beech-Nut Packing Co.*, discussed *supra* pp. 6-7).

Hence, a court, in reviewing the finding of the Commission on this question, in a given case, has the right and, in fact, the duty to examine the record fully for the purpose of determining whether the evidence before the Commission is sufficient to sustain such finding, just as this Court did in each of the cases hereinabove discussed, including the previous case of *Federal Trade Commission v. Raladam Company, supra*, page 7; "And this rule is not avoided by [the Commission] stating as a matter of fact what is a mere conclusion of law" (*Standard Oil Co. v. Fed. Trade Comm.*, discussed, *supra*, p. 7). Obviously, then, the function of the reviewing court, where such a finding of the Commission is challenged, is not merely perfunctory, the contentions of the Commission in the case at bar to the contrary notwithstanding.

The cases of *Federal Trade Commission v. Pacific States Paper Trade Association*, 273 U. S. 52, 62, and *Federal Trade Commission v. Algoma Lumber Co.*, 291 U. S. 67, 73, cited by the Commission on page 14 of its brief, do not in any way impinge upon the principles laid down by this Court in the decisions hereinabove discussed. Those cases merely applied, under proper circumstances, the express provision of the statute (Sec. 45, Title 15, U. S. C.) that "The findings of the Commission *as to facts*, if supported by the testimony, shall be

conclusive," and, therefore, held that where the Commission has evidence before it to support its inferences and findings, *as to matters of fact,* the reviewing court cannot make any independent appraisal of such evidence for the purpose of drawing different inferences or making different findings in regard thereto.

This of course presupposes the existence of evidence in the record to support such inferences and findings. Hence it is clear, in addition, despite the confusion in which the Commission seems to frequently find itself regarding the matter, that its prerogative to make findings and draw inferences that are conclusive, providing there is evidence in the record, conflicting or otherwise, to support the same, does not include, and hence does not deprive the reviewing court of, the right to determine whether there is, in fact, any such evidence in the record. Possibly it is the apparent zeal of the Commission to have its complaints ripen into orders to cease and desist, which will not be overturned on appeal, that causes it to so often lose sight of this principle, and to resent its inability to, thus, "lift itself by its own bootstraps," as it were; but whatever the cause of the Commission's disability in this regard, there can be no doubt concerning the verity of the principle.

In this connection it should also be noted that the inferences and findings of the Commission are not conclusive on the reviewing court, unless there is evidence in the record to support them, which is *substantial.* As this Court said in the recent case of *National Labor Relations Board v. Columbian Enameling & Stamping Co.*, 306 U. S. 292, 299-300, in speaking of the conclusiveness of findings of a similar administrative tribunal:

> "Section 10 (e) of the Act provides: '* * * The findings of the Board as to the facts, if supported by evidence, shall be conclusive.' But as has often been pointed out, this, as in the case of other findings by administrative bodies, means evidence which is substantial, that is, affording a substantial basis of fact from which the fact in issue can be reasonably inferred (citing cases). Substantial evidence is more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established. 'It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' *Consolidated Edison Co. v. National Labor Relations Board*, supra, p. 229 [305 U. S. 197], and it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury (citing cases)."

B. The decision of the lower Court (1) was rendered in accordance with *Federal Trade Comm. v. Raladam Co.*, 283 U. S. 643, and (2) does not invade the province of the Commission to make findings of fact that are conclusive, if supported by substantial evidence.

While the Commission devotes space in its brief to the discussion of such irrelevant matters as its finding that "respondent's representations are likely to result in injury to the health of purchasers of its product," in what is apparently an attempt to confuse the issues and bias the Court against the respondent, the only grounds of its petition which need any discussion are, *first*, its contention that "the decision below is in conflict with *Federal Trade Commission v. Raladam Co.*, 283 U. S. 643" (Commission's Brief, p. 9); and, *second*, its contention that "the decision below constitutes, in substance if not in form, a

serious breach of the statutory provision that the findings of the Commission, 'if supported by testimony,' shall be conclusive" (Commission's Brief, p. 14).

(1) The decision of the lower Court was rendered in accordance with *Federal Trade Commission v. Raladam Co.*, 283 U. S. 643.

This Court, in the previous case of *Federal Trade Commission v. Raladam Co.*, 283 U. S. 643, after holding on page 648 of its opinion that the question of what constitutes "unfair methods of competition in commerce," within the purview of the statute, in a given case, "is one for the final determination of the courts and not of the Commission," as hereinabove noted, *supra* page 7, went on to point out, on page 651 of its opinion, that:

> "While it is impossible from the terms of the act itself, and in the light of the foregoing circumstances leading up to its passage, reasonably to conclude that Congress intended to vest the Commission with the general power to prevent all sorts of unfair trade practices in commerce apart from their actual or potential effect upon the trade of competitors, it is not necessary that the facts point to any particular trader or traders. It is enough that there be present or potential *substantial* competition, which is shown by proof, or appears by *necessary* inference, to have been injured, or to be *clearly* threatened with injury, to a *substantial* extent by the use of the unfair methods complained of." (Italics ours)

This Court then proceeded to carefully analyze the evidence, which the Commission had before it on the hearing, and to conclude it was insufficient to support a finding essential to a Commission's jurisdiction that Raladam

Company was engaged "in unfair methods of competition" within the purview of the statute, due to the failure of such evidence to meet the test laid down on page 651 of its opinion, as aforesaid. The pertinent part of the Court's opinion in this connection is found on pages 652-53, and reads as follows:

> "Findings of the Commission justify the conclusion that the advertisements naturally would tend to increase the business of respondent; but there is neither finding nor *evidence* from which *the conclusion legitimately can be drawn* that these advertisements *substantially* injured or tended thus to injure the business of any competitor or of competitors generally, whether legitimate or not. . . . It is impossible to say whether, as a result of respondent's advertisements, any business was diverted, or was likely to be diverted, from others engaged *in like trade*, or whether *competitors*, identified or unidentified, *were injured* in their business, *or were likely to be injured*, or, indeed, whether any other anti-obesity remedies were sold or offered for sale in competition, or were of such a character as naturally to come into *any real competition* with respondent's preparation in the interstate market. All this was left without proof and remains, at best, a matter of conjecture. *Something more substantial than that is required as a basis for the exercise of the authority of the Commission.*" (Italics ours)

The lower Court in the instant case, after carefully reviewing the opinion of this Court in the previous case to find the true basis thereof, and then reviewing and discussing the evidence before the Commission, as this Court had done in the previous case, came to the unavoidable conclusion that such evidence was insufficient, under the test laid down in this Court's opinion, to support the Commission's jurisdictional finding that the respondent

was engaged in "unfair methods of competition," within the purview of the Act. In this connection, the lower Court said (123 F. (2d) 34, 37-8) (R. 784-85):

> "* * * There was *no substantial evidence* supporting the formula of the Supreme Court 'that these advertisements substantially injured or tended to injure the business of any competitor * * *.'
>
> * * *
>
> "* * * We find *no evidence* in the record upon which *a substantial inference* can be based that this was so. We cannot approve the finding of the Commission upon pure speculation * * *." (Italics ours)

Upon examining the Record, the lower Court found that the evidence, upon which the Commission had based its findings that Raladam Company was engaged in "unfair methods of competition, within the intent and meaning of Section 5" of the statute was of essentially the same kind and calibre, and therefore subject to the same deficiencies found by this Court in the evidence before the Commission in the previous case.

In other words, as in the previous case, the Commission has again failed to adduce evidence from which it is possible "to say whether, as a result of respondent's advertisements, any business was diverted, or was likely to be diverted, from others engaged in like trade, or whether competitors, identified or unidentified, were injured in their business, or were likely to be injured, etc." (Page 653 of this Court's opinion in the previous case, discussed, *supra*, p. 12).

Therefore, to epitomize the decision of the lower Court, it was bound to conclude, as it did conclude, that "There was no substantial evidence supporting the formula of the Supreme Court 'that these advertisements substan-

tially injured or tended to injure the business of any competitor * * *,'" with the necessary result that the Commission's jurisdictional finding that the respondent herein is engaged in "unfair methods of competition in commerce, within the intent and meaning of Section 5" of the Act, is again lacking in evidence to support it.

Finally, the contention of the Commission that the lower Court based its entire decision *solely* on the fact that there was no direct proof of injury to competitors of Raladam Company, like its contention that said decision is in conflict with *Federal Trade Commission v. Winsted Hosiery Co.*, 258 U. S. 483, are clearly unsound and may be dismissed with brief comment. With regard to the former contention, it is sufficient to point out that the lower Court merely considered such absence of direct proof of injury to competitors to be one of the deficiencies in the evidence before the Commission, precisely as this Court had done on page 653 of its opinion in the previous case, and as the Commission concedes is perfectly proper in the second paragraph on page 10 of its brief herein.

Hence, this contention of the Commission, together with its contention based thereon, and which must therefore fall therewith, that such a decision would place the lower Court in conflict with "decisions of four other circuit courts of appeals on the same matter," even though such a conflict with decisions based on different facts and circumstances were possible, may be characterized as a patent attempt by the Commission to import a non-existent error into the lower Court's decision, in the forlorn hope of manufacturing some possible basis for the issuance of a writ of certiorari in the instant case.

With regard to the Commission's contention that the *Winsted Hosiery* case requires a different decision than the one arrived at by the lower Court herein, it should be noted this same contention was urged upon this Court by the Commission in the previous case, and was disposed of unfavorably to the Commission on pages 651-52 of the opinion therein. Thus, it is submitted that the Commission's pertinacity in this regard, like that displayed in its perennial pursuit of the respondent herein, is worthy of a better cause.

(2) The lower Court's decision does not invade the province of the Commission to make findings of fact that are conclusive, if supported by substantial evidence.

No extended consideration of this point should be necessary, in view of the discussion and analysis of the lower Court's opinion in the preceding section of this brief, *supra*, pages 10-15, and the consideration given, *supra*, pages 6-10, to the proper function of a reviewing court, where the Commission's findings concerning what constitutes "unfair methods of competition," within the purview of the statute, in a given case, is challenged.

We have already seen in this connection that, in all cases, "The question is one for final determination of the courts and not of the Commission" (*Fed. Trade Comm. v. Raladam Co.*, and other cases discussed, *supra*, pp. 6-8); and that, in the instant case, the lower Court, after analyzing the evidence in the Record, just as this Court had done in the previous case, based its decision squarely upon the fact that "There was *no* substantial evidence [before the Commission] supporting the for-

mula of the Supreme Court 'that these advertisements substantially injured or tended to injure the business of any competitor * * *'" (R. 784). Hence, nothing more should be necessary to demonstrate that the Commission's contention that "the decision below" invades the province of the Commission to make conclusive findings of fact, if supported by substantial evidence is utterly unfounded.

Again, we submit that the Commission has apparently again, as in the past, confused its prerogative to make conclusive findings of *fact*, if supported by substantial evidence, with the prerogative of the reviewing court to ultimately determine (1) whether there is, in fact, any substantial evidence to support the findings of the Commission, on matters of fact, and (2) what legal results follow from the facts properly found.

C. The petition for a writ of certiorari should be denied because the decision of the lower Court is correct on other grounds urged upon it by respondent, but not relied on in such decision.

The familiar doctrine, recognized by this Court at an early date in *Collier v. Stanbrough*, 6 How. 14, 21, that the decision of a lower Court will be affirmed on appeal if it is correct on any ground appearing in the record, even though it be some other ground than that relied upon in such decision, furnishes still another reason for denying the petition of the Commission for a writ of certiorari. In urging the lower Court to set aside the order to cease and desist issued by the Commission herein, respondent contended, in addition to its argument on the merits of the case, *first*, that the decision of that Court in the previous case (reported in 42 Fed. (2d)

430) as affirmed by this Court in *Federal Trade Commission v. Raladam*, 283 U. S. 643, is *res adjudicata* of the issues which the Commission is seeking to litigate in the instant case; and, *second*, that the Commission lacks the power to avoid the ruling of this Court and the lower Court in the previous case, denying its petition to take further evidence on the existence of and injury to alleged competitors of the respondent, by instituting these new and independent proceedings for such purpose.

The lower Court, in rendering its decision herein, overruled the first of these contentions (R. 781) and disregarded the second. Nevertheless, it is submitted that these contentions of respondent are well taken and afford additional grounds of support for such decision, as will be briefly hereinafter pointed out, with the result that the petition of the Commission for a writ of certiorari should be denied.

(1) The decision of the lower Court in the previous case, as affirmed by this Court, is *res adjudicata* of the issues which the Commission is seeking to litigate in the instant case.

The issues, *first*, of whether Marmola was a safe and scientific treatment for the self-medication of obesity, and, *second*, whether the statements in the Marmola advertising, on the package, and in the circular enclosed therewith, regarding its safety and scientific nature, were prejudicial to the alleged competitors of Raladam and constituted unfair methods of competition in commerce within the purview of the Federal Trade Commission Act, were before the lower Court in the previous case. The findings of the Commission on these issues, and the record before the Commission on

which the findings purported to be based, were examined and were squarely passed upon, in the previous case, unfavorably to the Commission; and the decision of the lower Court in this regard was subsequently affirmed by this Court in *Federal Trade Commission v. Raladam Co.*, 283 U. S. 643. Under the principles laid down in the authorities hereinafter discussed, such decision in the previous case is *res adjudicata*, not only of the issues which were actually before it and passed upon therein, as aforesaid, but of everything, including any additional evidence, which the Commission might have brought forward and produced in support of its contentions in regard to those issues.

An examination of the record in the instant case, with these principles in mind, clearly discloses that the issues raised are the identical issues passed upon by this Court in the previous case. The most that can be said in behalf of the Commission is that it has produced a somewhat larger quantity of testimony, of essentially the same character and quality as that which it produced in support of its contentions regarding those issues in the previous case. In this manner it has unsuccessfully endeavored to repair the deficiencies in the record in the previous case by committing the common error of believing quantity to be a substitute for quality.

It is submitted that any such endeavor is both perfectly characterized and completely disposed of by the following excerpt from page 65 of the opinion of the Supreme Court in *Southern Pacific Railroad v. United States*, 168 U. S. 1:

> "* * * Whatever is new in the evidence now before us, touching that matter, is simply cumulative on the one side or the other. The application

to consider that evidence is practically an application for a rehearing as to things directly determined in the former suits between the same parties, and which adjudication has never been modified. Such a course of procedure is wholly inadmissible under the settled rule of res judicata. * * * "

The following cases are other decisions of this Court recognizing and applying the principles laid down in *Southern Pacific Railroad v. United States, supra.*

Below v. Morgan, 7 Wall. 619, 621, 621-2, 622-3;
Cromwell v. County of Sac, 94 U. S. 351, 352-3;
Werlein v. New Orleans, 177 U. S. 390, 398, 399-400, 403;
United States v. California and Oregon Land Co., 192 U. S. 355, 358, 359, 359-60;
Grubb v. Public Utilities Commission, 281 U. S. 470, 472, 472-3, 474, 475, 478, 478-9;
Chicot County Drainage Dist. v. Baxter State Bank, 308 U. S. 371, 375, 377-8.

For example: It cannot be denied that the parties are the same in the instant case as they were in the previous case; the subject matter is the same; and the statute under which these proceedings are brought is the same.* The amended complaint in the instant case (R. 44-45) again alleges, in substance, as did the complaint in the previous case, that the statements contained in the Marmola advertising, on the package, and in the circular enclosed therewith, to the effect that Marmola is a safe and scientific remedy for self-medication in cases of

* The statute has since been amended but such amendment was after the commencement of these proceedings and the issuance of the order of the Commission now under review, and, likewise, the labeling provisions of the Federal Food, Drug and Cosmetic Act of 1938 are not here involved.

obesity, are untrue, and have the tendency and capacity to mislead and induce the public "to purchase Marmola in preference to and to the exclusion of any and all identical or like or otherwise competitive products . . . all to the prejudice of the public and of respondent's [Raladam's] competitors and constitute unfair methods of competition within the intent and meaning of Section 5 of an Act of Congress, entitled, 'an Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes,' approved September 26, 1941" (R. 54). Thus, it is apparent that while slightly different language has been used and allegations of the amended complaint in the instant case have been rearranged and somewhat amplified by the recitation of certain scenic but unessential particulars, they are, in substance, the same in every fundamental and essential detail as the allegations of the complaint in the previous case.

After the issuance of the amended complaint in the case at bar, Raladam filed its answer thereto (R. 55-70), in which it denied the material allegations therein contained. On issue thus joined the matter again came on for a lengthy hearing before the Commission.

An examination of the record discloses that, in essence, the evidence which the Commission produced in the instant case is of the same character and calibre as that in the previous case. It goes to the attempted proof of exactly the same fundamental issues. It proves nothing more than did the evidence in the previous case, and by the same token it proves just as little.

Furthermore, no excuse is offered and no showing is made to justify the Commission's failure to produce the same evidence at the lengthy hearing in the previous

case. Every inference to be drawn from a reading of the record in this case results in the conclusion that either the same evidence or evidence of exactly the same kind was available and could readily have been produced in the previous case had the Commission seen fit or been at all diligent.

Nor do the inferences to be drawn from a reading of the record, as aforesaid, afford the only support for such a conclusion. At a matter of fact, its verity is further established by the motion (Raladam's Ex. 1) which the Commission made, first, to this Court and then to the lower Court, in the previous case (discussed, *supra* pp. 3-4), after its decree setting aside the Commission's order to cease and desist had been affirmed by this Court. In this motion the Commission requested the lower Court to modify its decree so "as to provide that such decree of reversal is without prejudice to further proceedings before the Commission in this cause (1) for the taking of *additional* evidence as to the competitors of petitioner herein, Raladam Company, and as to the injury to such competitors resulting from Raladam Company's unfair trade practices and (2) for making of further findings of fact and a further order based on such additional evidence."

First this Court, and then the lower Court, after receiving the briefs of the Commission and Raladam on the matter, entered orders denying the said motion (Raladam's Exs. 7 and 9); and it is submitted that these orders were, in effect, a direct adjudication of the question of the Commission's right to institute any further proceedings against Raladam, for the purpose of taking *additional* evidence on the question of the existence of and injury to alleged competitors of Raladam.

Thus, not only has the Commission had its day in court in the previous case on the very issues it is now seeking to re-litigate in the instant case, but, more conclusive still, it has had its day in court on the express question of whether it was entitled to conduct any further proceedings against Raladam for the purpose of taking *additional* evidence on such issues. In other words, this Court is presented with a double basis for applying the doctrine of *res adjudicata* in the instant case, although either basis is sufficient.

The only argument worthy of note advanced by the Commission in the lower Court as to why the foregoing contentions of respondent were incorrect was that these proceedings involved a different period of time. Respondent pointed out that this did not make any difference under the decision of this Court in *Tait v. Western Maryland Railway Co.*, 289 U. S. 620, 623, 624, wherein it was held:

> "The petitioner seeks a reversal on the merits, asserting that a judgment in a suit concerning income tax *for a given year* cannot estop either of the parties *in a later action* touching liability for taxes *of another year.* * * *
>
> * * *
>
> "As petitioner says, the scheme of the Revenue Acts is an imposition of tax for annual periods, and the exaction for one year is distinct from that for any other. But it does not follow that Congress in adopting this system meant to deprive the government and *the taxpayer* of *relief from redundant litigation of the identical question of the statute's application to the taxpayer's status.*
>
> "This court has repeatedly applied the doctrine of *res adjudicata* in actions concerning state taxes, holding the parties concluded in a suit for one

year's tax as to the right or question adjudicated by a former judgment respecting the tax of an earlier year * * *." (Italics ours)

The decision of this Court in *Chicago, Rock Island & Pacific Railway Co. v. Schendel*, 270 U. S. 611, 617, is also of interest in this connection. In that case this Court ruled:

> "The Iowa court, under the compensation law, in the due exercise of its jurisdiction, *having adjudicated the character of the commerce in which the deceased was engaged*, that matter, whether rightly decided or not, must be taken as conclusively established, so long as the judgment remains unmodified * * *." (Italics ours)

(2) The Commission lacks the power to avoid the ruling of this Court and the lower Court, in the previous case, denying its motion to take further evidence on the existence of and injury to alleged competitors of respondent by instituting these new and independent proceedings for such purpose.

Apart from any application of the doctrine of *res adjudicata* in the instant case, there is still another reason why the denial by this Court (Raladam's Ex. 9), and then by the lower Court (Raladam's Ex. 7), of the Commission's motion to institute

> "Further proceedings * * * (1) for the taking of additional evidence, as to the competitors of petitioner herein, Raladam Company, and as to the injury to such competitors resulting from Raladam Company's unfair trade practices" etc.

is an effective bar to these proceedings.

The Federal Trade Commission is purely a creature of statute, having only such powers and duties as are conferred upon it by the Federal Trade Commission Act, being an Act of Congress approved September 26th, 1914, entitled "An Act to create a Federal Trade Commission, *to define its powers* and duties, and for other purposes" (R. 44), (c. 311, 38 Stat. 717, Title 15 U. S. C., Sec. 41 *et seq.*).

While the official title of the Act: viz., "An Act to create a Federal Trade Commission, *to define its powers* and duties" etc., makes it plain that the provisions thereof are intended to be not only a grant but a limitation upon the powers of the Commission, for it is submitted the generally accepted meaning of the word "define" is "to limit" (Webster's New International Dictionary), the following statements by this Court in some of its recent decisions establish the matter beyond peradventure:

> "The powers of the Commission are limited by the statutes." (*Federal Trade Commission v. Sinclair Refining Co.*, 261 U. S. 463, 475)
>
> "Section 5 of the Act * * * declares unfair methods of competition in commerce unlawful, *prescribes the procedure to be followed*, and gives the Commission power to require an offending party to cease and desist from such methods." (*Federal Trade Commission v. Western Meat Co.*, 272 U. S. 554, 557)
>
> "While the Federal Trade Commission exercises under §5 the functions of both prosecutor and judge, the *scope* of its *authority is strictly limited.*" (*Federal Trade Commission v. Klesner*, 280 U. S. 19, 27)

"The Commission is an administrative body possessing *only such powers* as are granted by statute." (*Arrow-Hart & Hegeman Electric Co. v. Federal Trade Commission*, 291 U. S. 587, 598) (Italics ours)

Having established that "the powers of the Commission are limited by the statutes" (*Federal Trade Commission v. Sinclair Refining Co., supra*) and that "Section 5 of the Act * * * prescribes the procedure to be followed * * *" (*Federal Trade Commission v. Western Meat Co., supra*), the only inquiry remaining is as to what provision Section 5 of the Federal Trade Commission Act makes with reference to the institution of further proceedings against a respondent, as to whom an order to cease and desist has previously been issued, which order has been reviewed and set aside by the Circuit Court of Appeals for the proper circuit, as in the previous case of *Raladam Co. v. Federal Trade Commission* (42 Fed. (2d) 430). We submit that this is the only inquiry remaining, because, under the controlling authorities immediately hereinabove discussed, the procedure provided by Section 5 of the Act is the only procedure open to the Commission.

Section 5 of the Act (Sec. 45 of Title 15, U. S. C.), which is the Section under which both the complaint in the previous case (Raladam's Ex. 1) and in the instant case (R. 54) were issued, provides, among other things, that "unfair methods of competition in commerce are declared unlawful"; empowers and directs the Commission "to prevent * * * unfair methods of competition in commerce"; provides for the procedure to be followed by the Commission in such cases; gives the Circuit Court

of Appeals, for the proper circuit, jurisdiction to review the orders to cease and desist issued by the Commission, either upon application for enforcement, filed by the Commission, or petition to review, filed by the respondent, and, in that connection, "power to make and enter * * * a decree affirming, modifying, or setting aside the order of the Commission"; and goes on to further expressly provide, as follows:

> "* * * If either party shall apply to the court for leave to adduce *additional evidence*, and shall *show to the satisfaction of the court* that *such additional evidence is material* and that there were *reasonable grounds for the failure to adduce such evidence in the proceeding before the commission*, the court may order such additional evidence to be taken before the commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper * * *." (Italics ours)

Thus, it is apparent that Section 5 of the Federal Trade Commission Act makes express provision for the procedure to be followed in cases where the Commission seeks "to adduce *additional* evidence" on the issues in proceedings of the Commission, which have been reviewed and disposed of by the Circuit Court of Appeals for the proper circuit, as were the proceedings of the Commission in the previous case. The provision, in question, also discloses that obtaining leave to adduce such "additional evidence" is not merely a formality, which follows as a matter of right or as the necessary consequence of making application therefor.

On the contrary, it is expressly provided that, as a condition precedent to obtaining any such leave to adduce additional evidence, the applicant "*shall show to the satisfaction of the court* that such additional evidence is

material and that there were *reasonable grounds for the failure* to adduce such evidence in the proceeding before the Commission." In other words, the provision of Section 5 of the Act, now under discussion, clearly contemplates that the Circuit Court of Appeals shall have the *sole* power to determine, and then only upon a showing of the kind expressly provided for, whether the Commission shall conduct any further proceedings for the purpose of permitting, either itself or the respondent, to adduce additional evidence on issues on which the Commission has already conducted a hearing, made its findings and issued its order, and which proceedings and order have been reviewed and finally passed upon and disposed of by the Circuit Court of Appeals.

In view of the foregoing considerations, it follows, *a fortiori*, that there is only one course of procedure open to the Commission in such cases, and that is to comply with the express requirements of the statute, creating and empowering it, which are applicable thereto. It quite obviously cannot avoid those requirements by any such naive device as instituting new and independent proceedings for the purpose of adducing such additional evidence. In fact, the Commission, by making its motion to the lower Court for leave to adduce additional evidence in the previous case affirmatively recognized the requirement of the statute that it do so; and its institution of new proceedings, after that Court had denied its motion (Raladam's Ex. 7), can only be characterized as a patent attempt to circumvent such statutory requirement and the ruling of the Court, as aforesaid.

Before concluding this phase of the argument, there is a general principle of statutory construction that should be noted, because of its application to the question

under discussion, and that is the principle of "*Expressi Unius Est Exclusio Alterius.*" As this Court so tersel puts it in the case of *Botany Worsted Mills v. Unite States*, 278 U. S. 282, 289:

> "* * * When a statute limits a thing to be don in a particular mode, it includes the negative o any other mode. * * *"

The principle of "*Expressio Unius Est Exclusio Alterius* and its application are well discussed in 25 Ruling Cas Law 981, Sec. 229.

Therefore, it is submitted that there was only on method of procedure open to the Federal Trade Commi sion if it wanted to adduce additional evidence on th issue involved in the previous case, and that was to fo low the procedure outlined in Section 5 of the Federa Trade Commission Act, which has been hereinabove di cussed. Having followed that procedure, which was th only course open to it, as aforesaid, and the lower Cou having denied its application to conduct a further hea ing for the purpose of adducing such additional evidenc it had reached the end of the road. Consequently, th institution of these proceedings against Raladam for th same purpose was highly improper as being beyond an power granted to the Commission, and as being, in effec a power denied to it under the well settled principle o statutory construction known as "*Expressio Unius Es Exclusio Alterius.*"

CONCLUSION

In conclusion, then, it is submitted that the petition of the Commission for a writ of certiorari herein should be denied because the decision of the lower Court is correct, not only on the ground upon which it is based but on the additional grounds urged upon it by respondent, as aforesaid; which are immediately hereinabove discussed.

It cannot be that an administrative tribunal, after unsuccessfully prosecuting a proceeding instituted by and before itself through the highest court in the land, can ignore all that has gone before, and start anew under the same statute against the same respondent, who has in no way changed his course of conduct, merely to bring forth additional evidence of the same kind and calibre as it produced, or which was available and it could have produced, before. Certainly, under such circumstances, the respondent is entitled to the ordinary protection of the high principle of public policy that there shall be an end of litigation over a particular matter.

Furthermore, Section 5 of the Act expressly provides the procedure for the bringing forward of such additional evidence. It lays down the conditions upon which the Commission shall be permitted to bring it forth. Having availed itself of this procedure, albeit without success, the Commission has exhausted its remedies, and cannot, thus, patently circumvent the express provisions of the statute in the manner attempted herein.

In view of these considerations, if for no other reason, it seems clear that this Court should not be again re-

quired to take up its valuable time with anything so prosaic as what is well on the road to becoming a perennial controversy between respondent and the Commission over the question of whether this same course of conduct, in which the respondent was engaged at the time of the commencement of proceedings, in both the previous and the instant case, constitutes "unfair methods of competition," within the purview of the Federal Trade Commission Act. It would seem that the principles of *stare decisis* and *res adjudicata*, so frequently applied by this Court in other cases, furnish sufficient precedent for bringing any legal controversy to an end eventually, even though it be with the Commission, and respondent trusts, with a feeling of considerable poignancy, that this controversy has finally reached that stage, at long last.

Respectfully submitted,

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